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6 UNITED STATES DISTRICT COURT
7 DISTRICT OF NEVADA

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9 STEVEN A. KEGEL,

10 Plaintiff,

11 v.

12 BROWN & WILLIAMSON TOBACCO
13 CORPORATION, et al.,

14 Defendants.

3:06-CV-00093-LRH-VPC

ORDER

15 Presently before the court is Defendants Brown & Williamson Tobacco Corporation, et al.'s
16 (collectively, "Defendants") Motion for Summary Judgment (#115¹). Plaintiff Steven Kegel has
17 filed an opposition (#128) to which Defendants replied (#135). Also before the court are
18 Defendants' Errata to Reply in Support of Summary Judgment (#137) and Amended Statement of
19 Undisputed Facts (#139). In response, Plaintiff has filed a motion to strike both documents (#140).

20 **I. Facts and Procedural History**

21 This case arises out of Plaintiff's termination from employment with Defendant Brown &
22 Williamson Tobacco Corporation ("Brown & Williamson") and Defendant R.J. Reynolds Tobacco
23 Company ("R.J. Reynolds"). Plaintiff is a resident of Washoe County, Nevada. Defendant R.J.
24 Reynolds is a North Carolina corporation doing business in the State of Nevada. Defendant Brown
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26 ¹ Refers to the court's docket number.

1 & Williamson was a Delaware corporation that conducted business in the State of Nevada. The
2 remaining Defendants are Reynolds American Incorporated Employee Benefits Committee and
3 various benefit plans organized by Brown & Williamson, R.J. Reynolds, and Reynolds American,
4 Incorporated.²

5 In October of 1980, the American Tobacco Company (“American Tobacco”) hired Plaintiff
6 as a sales representative. In January of 1995, American Tobacco merged with Brown &
7 Williamson. Following the merger, Plaintiff continued to work for Brown & Williamson as a
8 territory sales manager. In hiring Plaintiff, Brown & Williamson appears to have agreed to
9 maintain October of 1980 as Plaintiff’s starting date of employment with Brown & Williamson.

10 As a territory sales manager, Plaintiff drove to stores throughout rural Nevada to sell Brown
11 & Williamson tobacco products. His written job description provided that the position required
12 “heavy daily travel” and physical demands including, “bending, squatting, reaching, and lifting up
13 to 40 pounds.” (Pl.’s Opp. Mot. Summ. J. (#128), Ex. 9.) To complete his duties, Plaintiff was
14 sometimes required to travel by car six to eight hundred miles per week.

15 **A. Worker’s Compensation Claims**

16 Beginning in 1997, Plaintiff suffered several work-related injuries. First, in September of
17 1997, Plaintiff fractured his wrist while changing a tire on his vehicle. As a result of the injury,
18 Plaintiff filed a worker’s compensation claim. Allegedly, Plaintiff also began experiencing lower
19 back pain after the accident, but he did not include the symptom on his worker’s compensation
20 claim. On October 7, 1998, doctors diagnosed Plaintiff with “[a]cute left S1 radiculopathy
21 secondary to a herniated disc” and “discogenic low back pain.” (Pl.’s Opp. Mot. Summ. J. (#128),
22 Ex. 15.) The doctors placed Plaintiff on a comprehensive physical therapy program. As a part of
23 the program, Plaintiff was permitted to swim, walk on a treadmill, and use a stationary bike.

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25 ² The court’s jurisdiction is based both on diversity of citizenship and on the resolution of a federal
26 question, namely the violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-
1462.

1 On April 1, 1999, Plaintiff suffered a second job-related injury when his vehicle was rear
2 ended, and he suffered injuries to his back and neck. Plaintiff filed a worker's compensation claim
3 relating to the incident. The worker's compensation carrier initially accepted Plaintiff's claim in
4 part, covering Plaintiff's cervical and lumbosacral strain, but eventually extended the claim to
5 cover degenerative changes at the L4-5 and L5-S1. Plaintiff's claim remained open until March of
6 2006 when he received a permanent partial disability award.

7 On January 9, 2003, Plaintiff suffered a third job-related injury. While removing a large
8 neon sign from the window of a client's store, Plaintiff heard a pop and felt pain shoot into his neck
9 and upper back. Initially, Plaintiff was diagnosed with cervical and thoracic strain. Plaintiff filed a
10 worker's compensation claim, and the worker's compensation carrier accepted a claim for "mild
11 thoracic spine strain." (Pl.'s Opp. (#128), Ex. 50.)

12 As Plaintiff's pain failed to improve in response to treatment and as driving "could certainly
13 be contributing to a lot of muscular tension in the cervical and thoracic spine," on May 14, 2003,
14 Plaintiff's doctor restricted his work duties to driving no more than thirty minutes at a time. (Pl.'s
15 Opp. (#128), Ex. 50 at 56.) On October 9, 2003, Plaintiff attended an Independent Medical
16 Evaluation ("IME") scheduled by the worker's compensation carrier. The examining physical
17 diagnosed Plaintiff with cervical spondylosis,³ cervical discogenic neck pain with referral to the
18 thoracic area,⁴ and lumbar spondylosis at L5-S1 with chronic discogenic low back pain. Plaintiff
19 eventually accepted a permanent partial disability award for the claim.

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25 ³ Spondylosis is a disorder caused by abnormal wear on the cartilage and bones.

26 ⁴ Discogenic pain is pain caused by degeneration of intervertebral discs.

1 **B. Merger**

2 In October of 2003 Brown & Williamson announced a potential “merger”⁵ with R.J.
3 Reynolds, which would result in a new company, Reynolds American, Incorporated (“Reynolds
4 American”). Brown & Williamson expected the merger to be complete in August of 2004.

5 In anticipation of the merger, Brown & Williamson developed a severance plan for salaried
6 employees. Under the basic severance package, an employee would receive one month pay for
7 every year of service, with a minimum of three months and a maximum of fifteen months. The
8 plan also provided that a termination for cause would result in a loss of eligibility for the severance
9 benefits. The plan defined “cause” as a termination for gross misconduct, including dishonesty.

10 The Severance Plan also addressed retiree health care. Generally, to qualify for retiree
11 health care an employee would have to reach the age 55 and have ten years of service. Recognizing
12 that a number of employees would not qualify under this plan upon the merger, the Severance Plan
13 gave employees the option of selecting an alternative severance plan, which called for a reduction
14 in the severance payment in exchange for a retiree health care component. These plans came in
15 several types, including a “Rule of 70” plan, a “Rule of 65” plan, and a “Rule of 60” plan.

16 Under the Rule of 70 plan, employees not otherwise eligible for retiree medical coverage
17 who were fifty years of age or older at their release date, who had served at least ten years, and
18 whose age and qualifying service added to seventy years would have a one-time option to substitute
19 fifty percent of their severance pay in exchange for retiree medical coverage. As an alternative,
20 employees could take the full severance, and Brown & Williamson would pay the full cost of
21 employee coverage until the age of sixty-five. At the time Brown & Williamson announced the
22 Severance Plan, Plaintiff was forty-eight years old and had completed approximately twenty-three
23 years of service. Having not reached the age of fifty, Plaintiff did not then qualify for the Rule of
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25 ⁵ The exact contours of the business arrangement is not clear. Regardless, in this order the court will
26 refer to the arraignment as a “merger.”

1 70 plan.

2 The Rule of 60 plan applied to individuals employed by Brown & Williamson prior to July
3 1, 1994. Under the rule, employees had to have completed at least ten years of qualifying service,
4 and the employee's age plus qualifying years of service had to equal sixty years or more. If these
5 requirements were met, the employee could retire at any time and begin receiving a pension after
6 the employee reached the age of fifty. Upon announcing the merger, Defendants informed Plaintiff
7 that he did not qualify for the Rule of 60 plan because he was not hired by Brown & Williamson
8 until 1995 and therefore was not a Brown & Williamson employee prior to July 1, 1994, as
9 required by the plan.

10 **C. Short-Term Disability**

11 In June of 2004, Plaintiff saw his internist, Dr. Jay Schroeder. Dr. Schroeder had evaluated
12 and treated Plaintiff's chronic back and neck pain since October of 1998. Dr. Schroeder noted that
13 sitting increased Plaintiff's pain and that Plaintiff "needs off work until he has back surgery."
14 (Defs.'s Mot. Summ. J. (#115), Exs. L, M.)

15 Plaintiff then informed Brown & Williamson that as a result of his back injuries he might
16 have to have surgery which would require him to take short-term disability leave. Plaintiff asked
17 how this would affect the severance offer or his ability to receive a job offer with the new company,
18 Reynolds American. Brown & Williamson responded that participation in the short term disability
19 program would not impact the severance offer or impact those who would be offered ongoing
20 employment with the new company. They stated, "If you do not receive an offer of ongoing
21 employment, and you are receiving payments under the [short term disability] program at the time
22 you receive notice of employment termination, your Release Date will be postponed until you are
23 released to return to work or you exhaust your short term disability benefits." (Defs.' Mot. Summ.
24 J. (#115), Ex. H.) Under the short term disability plan, Plaintiff could claim up to twelve months of
25 short-term disability benefits. During that time Plaintiff would be paid his full salary.

1 In June of 2004, Plaintiff went on short term disability leave pending back surgery. On
2 June 8, 2004, Dr. Jacob Blum, a consultant for Brown & Williamson wrote to Dr. Schroeder
3 requesting that Dr. Schroeder release Plaintiff for light work. Dr. Blum based this request on his
4 review of Plaintiff's medical records and job duties. Dr. Blum believed that Plaintiff could
5 continue working if he was in a sedentary position. In response to Dr. Blum's request, on June 17,
6 2004, Dr. Schroeder informed Dr. Blum that "Plaintiff is not to continue his position until further
7 notice." (Pl.'s Opp. Mot. Summ. J. (#128), Ex. 79.)

8 On June 21, 2004, Dr. Blum informed Judy Greenwell, R.J. Reynolds' Senior Benefit
9 Administrator, that Plaintiff's doctor had "refused attempts at accommodation in terms of lifting."
10 (*Id.*, Ex. 78.) Dr. Blum concluded that "there is little other choice th[a]n waiting for the surgical
11 consultation and/or arranging an IME." (*Id.*) Throughout June and July of 2004, Dr. Schroeder
12 maintained that Plaintiff remain off work until his back issues were resolved. Dr. Schroeder also
13 instructed Plaintiff to engage in physical therapy, including strengthening exercises.

14 On July 21, 2004, Plaintiff traveled to California to see a specialist. The specialist placed
15 Plaintiff on a wait list to receive surgery sometime in October of 2004. The specialist further
16 recommended that Plaintiff have a discogram to determine the proper course of treatment.⁶

17 On August 22, 2004, Dr. Blum wrote a second letter to Ms. Greenwell indicating that
18 Plaintiff had failed to comply with the medical recommendations of his doctors because Plaintiff
19 had yet to undergo the recommended discogram. As a result, Dr. Blum concluded that Plaintiff's
20 "continued eligibility for short term disability benefits [was] in doubt." (Pl.'s Opp. Mot. Summ. J.
21 (#128), Ex. 87.)

22 Ms. Greenwell then informed Plaintiff that if he could supply R.J. Reynolds with the results
23 of the discogram by September 3, 2004, his claim would be re-evaluated. If Plaintiff failed to
24 provide the results by that date, Plaintiff's employment would end effective August 31, 2004. In
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26 ⁶ A discogram is an enhanced x-ray examination of the pad of cartilage that separate the vertebrae.

1 response, Plaintiff notified Ms. Greenwell that because of Plaintiff's increasing complaints about
2 lower back pain, the specialist had recommended that Plaintiff undergo an MRI before undergoing
3 the discogram. Plaintiff informed Ms. Greenwell that he had scheduled an MRI for September 7,
4 2004, an appointment with Dr. Schroeder on September 8, 2004, and an appointment with the
5 specialist on September 15, 2004.

6 In October of 2004, Dr. Blum scheduled an IME of Plaintiff. The company instructed the
7 physician conducting the examination only to determine whether Plaintiff could perform sedentary
8 work and not to consider a "whole body [percentage] impairment rating, differential diagnosis,
9 and/or treatment plan." (Pl.'s Opp. Mot. Summ. J. (#128), Ex. 96.) After reviewing Plaintiff's
10 medical records and conducting a physical examination, the doctor concluded that Plaintiff was
11 "disabled totally from gainful employment." (*Id.*, Ex. 98.)

12 Dr. Blum reviewed the doctor's report and found it insufficient. In particular, Dr. Blum
13 noted inconsistencies in the history provided to the physician, particularly relating to Plaintiff's use
14 of pain medication. In addition, Dr. Blum noted that the "AMA Guides to the Evaluation of
15 Permanent Impairment, required the evaluation to be based on physical findings, not on the
16 subjective report of pain." (Defs.' Mot. Summ. J. (#115), Ex. S.) However, as noted, Dr. Blum
17 specifically instructed the doctor not to evaluate Plaintiff's impairment and to limit the examination
18 to determining whether Plaintiff could perform sedentary work.

19 Upon completion of the merger, the responsibility for former Brown & Williamson
20 employees on short-term disability was transferred to R.J. Reynolds. R.J. Reynolds amended the
21 short-term disability plan such that the Administrator under the plan became the medical director of
22 Reynolds American, Dr. J. Kerry Collins. In addition, R.J. Reynolds amended the plan such that,
23 effective February 21, 2005, the Administrator's determination regarding eligibility for benefits
24 under the plan would be final and binding.

25 In January of 2005, Dr. Collins scheduled a second examination for Plaintiff. Dr. Collins
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1 wrote to the examining doctor, stating that Plaintiff had been out of work since 2003.⁷ Dr. Collins
2 also told the doctor that Plaintiff had been a “no show” for several scheduled surgeries. On January
3 13, 2005, Plaintiff underwent a Functional Capacities Evaluation. Based on a variety of physical
4 tests, the doctor concluded that Plaintiff “could not return to his previous position in sales with the
5 lifting and driving requirement.” (Pl.’s Opp. Mot. Summ. J. (#128), Ex. 103.)

6 R.J. Reynolds rejected the examining doctor’s conclusion, reasoning that Plaintiff had
7 intentionally limited his exertion and abilities during the examination. As a result, R.J. Reynolds
8 concluded that the examination lacked validity and reliability. R.J. Reynolds did not discuss their
9 concerns with the evaluator.

10 Dr. Collins then scheduled Plaintiff for another examination. Before Plaintiff underwent
11 the examination, Dr. Collins contacted the evaluator and informed the evaluator that Dr. Collins’
12 predecessor, Dr. Blum, had “felt that [Plaintiff’s] symptoms were probably exaggerated and the
13 treating doctors were simply reiterating what [Plaintiff] was telling them.” (Pl.’s Opp. Mot. Summ.
14 J. (#128), Ex. 104.) He further stated, “[Plaintiff] does have an incentive to stay out of work until
15 spring when he would become eligible for a long-term disability package through the company.”
16 (*Id.*)

17 On January 25, 2005, Plaintiff underwent the examination. Based on a “severe paraspinal
18 spasm with limiting range of motion,” Plaintiff’s report of significant low back pain, and findings
19 of an MRI, the examiner concluded that Plaintiff had exhausted his non-operative care and was an
20 excellent candidate for surgery at L5-S1.

21 Beginning in December of 2004, Dr. Collins arranged for surveillance of Plaintiff. On
22 February 1, 2005, Plaintiff was videotaped driving his vehicle to the local health club and entering
23 the health club. On February 22, 2005, Plaintiff was allegedly seen shoveling snow. Plaintiff
24 denies shoveling snow, and Plaintiff’s wife states that she has to shovel snow because her husband

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26 ⁷ In reality, Plaintiff had worked until June of 2004.

1 cannot.

2 On February 23, 2005, Plaintiff was videotaped driving his wife to work and driving from
3 Incline Village, Nevada to Reno, Nevada, where Plaintiff shopped and then returned to Incline
4 Village. The following day, Plaintiff was videotaped driving to the health club. Plaintiff then
5 entered the health club, and over an hour and a half period Plaintiff was videotaped working on
6 various weight lifting machines and jogging on the treadmill for twenty minutes. During the
7 weight lifting exercises, the individual running the videotape allegedly observed Plaintiff lift a
8 variety of weight from twenty pounds to a 155-pound barbell.⁸

9 **D. Termination**

10 On March 8, 2005, based on the alleged discrepancies between the surveillance and
11 Plaintiff's representations regarding his pain and physical, R.J. Reynolds informed Plaintiff that he
12 was no longer eligible for short term disability benefits. The letter stated that Plaintiff had a right
13 to appeal the denial of his short term disability benefits. In addition, in a separate letter R.J.
14 Reynolds informed Plaintiff that effective March 8, 2005, his employment was also "terminated"⁹
15 and that he was no longer eligible for Special Severance Benefits because his termination was for
16 cause.

17 It is unclear who made the decision to terminate the disability benefits. Dr. Collins, as the
18 Administrator of the short term disability plan, was responsible for determining whether an
19 employee was entitled to short term disability benefits. However, Dr. Collins denies any
20 involvement in the decision to terminate Plaintiff's disability benefits. Ella Long testified that the
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22 ⁸ Plaintiff disputes the amount of weight Defendants claim he lifted. Plaintiff notes that from the
23 videotape it is not clear how much weight he lifted and the individual running the videotape could not recall
24 how he determined how much weight Plaintiff had lifted. Plaintiff also disputes that it was him jogging on the
videotape.

25 ⁹ R.J. Reynolds never offered Plaintiff a position. However, as discussed above, because Plaintiff was
26 on short term disability at the time of the merger, Plaintiff's termination date was extended to the completion
of Plaintiff's short term disability.

1 decision to terminate Plaintiff's disability benefits was a collaborative decision between Ms. Long,
2 her superior Steve Karr, and Dr. Collins.

3 On March 16, 2005, Plaintiff sent letters to R.J. Reynolds employees Judy Greenwell,
4 Senior Benefits Administrator, Shannon Tremblay, Senior Management of Sales Employment
5 Practices, and Ella Long, Senior Management of Employment Practices, requesting an appeal of the
6 termination of short term disability benefits. In addition, Plaintiff requested "all copies of records,
7 documentation that supported the decision to terminate me. Specifically copies of records,
8 documentation, that support the statement that I have misrepresented to the Company my medical
9 condition and physical limitations" (Pl.'s Opp. Mot. Summ. J. (#128), Exs. 115, 116, 117.) In
10 response to this request, Ella Long explained to Plaintiff the reasons for his termination, but did not
11 provide Plaintiff with any documents. She also informed Plaintiff that the termination of his short
12 term disability benefits was final and not subject to appeal.

13 On January 12, 2006, Plaintiff sent a written request to Ella Long, Senior Management of
14 Employment Practices, seeking the name and a copy of "R.J. Reynolds/Reynolds American
15 Employee Benefits Plan." (Pl.'s Opp. Mot. Summ. J. (#128), Ex. 132.) On January 17, 2006,
16 Jennie Beasley, Director of Corporate and Benefit Compliance, responded, informing Plaintiff she
17 needed to know to "which kind of benefit plan (pension, medical, 401(k), disability, etc.)" Plaintiff
18 was referring. (*Id.*) On January 27, 2006, through his attorney, Plaintiff again sent a letter seeking
19 the requested information. On February 22, 2006, Ms. Beasley responded, identifying the
20 employee benefit plans in which Plaintiff was eligible to participate prior to his termination. Ms.
21 Beasley included in her response copies of each plan.

22 **II. Legal Standard**

23 Summary judgment is appropriate only when "the pleadings, depositions, answers to
24 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
25 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of
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1 law.” Fed. R. Civ. P. 56(c). In assessing a motion for summary judgment, the evidence, together
2 with all inferences that can reasonably be drawn therefrom, must be read in the light most favorable
3 to the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574,
4 587 (1986); *County of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1154 (9th Cir. 2001).

5 The moving party bears the burden of informing the court of the basis for its motion, along
6 with evidence showing the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*,
7 477 U.S. 317, 323 (1986). On those issues for which it bears the burden of proof, the moving party
8 must make a showing that is “sufficient for the court to hold that no reasonable trier of fact could
9 find other than for the moving party.” *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.
10 1986); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1141 (C.D. Cal. 2001).

11 To successfully rebut a motion for summary judgment, the non-moving party must point to
12 facts supported by the record which demonstrate a genuine issue of material fact. *Reese v.*
13 *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736 (9th Cir. 2000). A “material fact” is a fact “that might
14 affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S.
15 242, 248 (1986). Where reasonable minds could differ on the material facts at issue, summary
16 judgment is not appropriate. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983). A dispute
17 regarding a material fact is considered genuine “if the evidence is such that a reasonable jury could
18 return a verdict for the nonmoving party.” *Liberty Lobby*, 477 U.S. at 248. The mere existence of a
19 scintilla of evidence in support of the plaintiff’s position will be insufficient to establish a genuine
20 dispute; there must be evidence on which the jury could reasonably find for the plaintiff. *See id.* at
21 252.

22 **III. Discussion**

23 In the fourth amended complaint (#109), Plaintiff alleges the following claims for relief: (1)
24 wrongful termination; (2) breach of implied covenant of good faith and fair dealing; (3) intentional
25 infliction of emotional distress; (4) negligent infliction of emotional distress; (5) “recovery of
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1 benefits under Employee Benefit Plan and Declaration of Rights”; (6) termination for exercise of
2 rights under employee benefit plans in violation of 29 U.S.C. § 1140; (7) defamation; (8) breach of
3 contract; and (9) breach of implied covenant of good faith and fair dealing. The court will discuss
4 each of these claims below.

5 **A. Tortuous Discharge**

6 In the complaint, Plaintiff first alleges Defendants Brown & Williamson and R.J. Reynolds
7 terminated Plaintiff in retaliation for Plaintiff’s filing worker’s compensation claims. Plaintiff
8 maintains that this retaliation “constitutes a wrongful and tortuous discharge . . . in violation of the
9 fundamental public policy of the State of Nevada . . .” (Fourth Am. Compl. (#109) ¶ 48.)

10 An employer commits a tortuous discharge by terminating an employee for reasons that
11 violate public policy. *D’Angelo v. Gardner*, 819 P.2d 206, 212 (Nev. 1991). Although the tortuous
12 discharge claim arises out of the employer-employee relationship, such a claim does not depend on
13 a contract of continued employment between the employee and the employer. *Id.* at 216. Instead,
14 “The essence of a tortuous discharge is the wrongful, usually retaliatory, interruption of
15 employment by means which are deemed to be contrary to the public policy of the state.” *Id.*
16 Nevada has recognized that terminating an employee in retaliation for filing a worker’s
17 compensation claim violates public policy and supports a claim for tortuous discharge. *Hansen v.*
18 *Harrah’s*, 675 P.2d 394 (Nev. 1984).

19 To establish a claim for tortuous or retaliatory discharge, Plaintiff must demonstrate that
20 retaliation for the protected speech was the cause of his termination. *Allum v. Valley Bank of Nev.*,
21 970 P.2d 1062, 1066 (Nev. 1998). Thus, in *Allum*, the Nevada Supreme Court held, “[R]ecovery
22 for retaliatory discharge under state law may not be had upon a ‘mixed motive’ theory; thus, a
23 plaintiff must demonstrate that his protected conduct was *the* proximate cause of the jury.” *Id.*
24 (emphasis in original).

25 Even, as it must, viewing the evidence in the light most favorable to Plaintiff and making all
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1 reasonable inferences in Plaintiff's favor, the court will grant Defendants' motion for summary
2 judgment as to this claim. Plaintiff has failed to identify any evidence indicating that the worker's
3 compensation claims played a role in Defendant's decision to terminate Plaintiff. Moreover,
4 Plaintiff fails to provide any evidence indicating that the filing of such claims was the proximate
5 cause of his termination rather than one of many causes. Instead, Plaintiff himself admits,
6 "Reynolds wanted to terminate me for many different reasons, one of them included my worker's
7 compensation claim" (Defs.' Mot. Summ. J. (#115), Ex. G, 266:3-5.) Summary judgment as
8 to the tortious discharge claim is therefore appropriate.

9 **B. Breach of Implied Covenant of Good Faith and Fair Dealing**

10 Plaintiff's second claim for relief alleges that an employment agreement between Plaintiff
11 and Defendants Brown & Williamson and/or R.J. Reynolds contained an implied covenant of good
12 faith. Plaintiff contends that Defendants breached this implied covenant by discharging Plaintiff in
13 retaliation for his worker's compensation claims.

14 A claim of bad faith discharge may lie where a tenured employee who enjoyed a right to
15 continued employment was terminated by an employer in bad faith. *See K-Mart Corp. v. Ponsock*,
16 732 P.2d 1364, 1369-70 (Nev. 1987) (recognizing a bad faith discharge claim "in this fact-specific
17 instance of discharge by a large, nationwide employer of an employee in bad faith for the improper
18 motive of defeating contractual retirement benefits."). For a bad faith discharge claim to apply, the
19 plaintiff must establish the following: (1) an enforceable contract; (2) a special relationship
20 between the tortfeasor and the tort victim; and (3) the employer's conduct must go "well beyond
21 the bounds of ordinary liability for breach of contract." *Martin v. Sears, Roebuck and Co.*, 899
22 P.2d 441, 555 (Nev. 1995).

23 Defendants argue Plaintiff's at-will employment precludes any "bad faith" claim under
24 Nevada law. Indeed, in *Martin* the Nevada Supreme Court held that "breach of contract and bad
25 faith discharge are not applicable to at-will employment." *Id.* Plaintiff's cites *Ponsock* for the
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1 proposition that a bad-faith discharge claim can arise out of an at-will employment arrangement.
2 However, Plaintiff's reliance on *Ponsock* is misplaced. The parties in *Ponsock* stipulated to an
3 employment contract. *Ponsock*, 732 P.2d at 1366 n.1. Here, the parties have not stipulated to an
4 employment agreement, and Defendants expressly deny that any such agreement existed.

5 Nonetheless, Plaintiff maintains that the short term disability benefits plan created an
6 implied employment agreement. He argues, "[the short term disability benefits] were part of
7 Plaintiff's express employment agreement with Defendant whereby Plaintiff agreed to provide
8 certain labor services in exchange for monetary compensation in the form of a salary and benefits."
9 (Pl.'s Opp. Mot. Summ. J. (#128) at 51.)

10 Cases recognizing an implied employment contract have done so in reference to employee
11 handbooks or other evidence indicating an agreement between the parties that the employer will
12 terminate the employee only for cause. *See Southwest Gas Corp v. Ahmad*, 668 P.2d 261 (1983).
13 Here, the short term disability plan provides, "The Company assumes no obligation to continue this
14 Plan in effect, and reserves the right at any time thereafter to terminate the Plan in whole or in
15 part." (Defs.' Mot. Summ. J. (#115), Ex. I.) Thus, the language of the plan indicates that the
16 company could terminate the disability benefits at any time and for any reason. Further, the
17 language of the plan appears to exclude the plan from compensation packages for service rendered
18 and instead indicates that the distribution of benefits under the plan was in the discretion of the
19 company.

20 Thus, here as in *Martin*, Plaintiff has offered no evidence of a contract beyond his own
21 subjective expectations of long term employment. "Such expectations are insufficient to
22 substantiate an express or implied agreement for continuing employment." *Martin*, 899 P.2d at
23 555. Because Plaintiff was an at-will employee, his claim for bad faith discharge must fail.
24 Accordingly, the court will grant summary judgment with regard to this claim.

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1 **C. Intentional Infliction of Emotional Distress**

2 To establish a claim for intentional infliction of emotional distress, the plaintiff must
3 establish the following: (1) “extreme and outrageous conduct with either the intention of, or
4 reckless disregard for, causing emotional distress”; (2) severe or extreme emotional distress; and
5 (3) actual or proximate causation. *Star v. Rabello*, 625 P.2d 90, 92 (Nev. 1981) (citation omitted).

6 Extreme and outrageous conduct “is that which is ‘outside all possible bounds of decency’
7 and is regarded as ‘utterly intolerable in a civilized community.’” *Maduike v. Agency Rent-A-Car*,
8 953 P.2d 24, 26 (Nev. 1998) (citations omitted). This is not such a case. Rather, this case involves
9 ordinary tort and breach of contract claims. The court finds no allegations in this case that amount
10 to extreme and outrageous conduct and Plaintiff has pointed to no specific evidence to support such
11 a claim. Thus, summary judgment is appropriate on this claim.

12 **D. Negligent Infliction of Emotional Distress**

13 “[I]n cases where emotional distress damages are not secondary to physical injuries, but
14 rather, precipitate physical symptoms, either a physical impact must have occurred, or in the
15 absence of physical impact, proof of ‘serious emotional distress’ causing physical injury or illness
16 must be presented.” *Barmettler v. Reno Air, Inc.*, 856 P.2d 1382, 1387 (Nev. 1998). General
17 physical or emotional discomfort are insufficient to establish a claim for negligent infliction of
18 emotional distress. *Id.* (citation omitted).

19 Here, there is no evidence of physical impact or serious emotional distress causing physical
20 injury or illness. In the complaint, Plaintiff alleges that he suffered “shame, despair, humiliation,
21 embarrassment, depression, and emotional distress.” (Fourth Am. Compl. (#109) ¶ 65.) Nothing in
22 the record indicates that Plaintiff suffered physical injury or illness either before or after the alleged
23 emotional distress. Accordingly, summary judgment is appropriate on this claim.

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1 **E. Employment Retirement Income Security Act**

2 In the complaint, Plaintiff alleges a variety of violations of the Employment Retirement
3 Income Security Act (“ERISA”), 29 U.S.C. §§ 1001-1462. In particular, Plaintiff appears to allege
4 the following ERISA-based claims for relief: (1) a claim for benefits under the Short Term
5 Disability Plan, the Welfare and Fringe Benefit Plan, the Retirement Plan, and the Special
6 Severance Benefits Plan pursuant to 29 U.S.C. § 1132(a); (2) failure to provide information as
7 required by 29 U.S.C. § 1132(c); (3) equitable estoppel; and (4) wrongful termination in violation
8 of 29 U.S.C. § 1140. The court will address each of these claims below.

9 **1. Termination of Short Term Disability Benefits**

10 As a preliminary matter, Defendants argue the short term disability plan is not an
11 employment benefit plan covered by ERISA. In relevant part, ERISA defines an “employee benefit
12 plan” as an “employee welfare benefit plan” 29 U.S.C. § 1002(3). An employee welfare
13 benefit plan is “any plan, fund, or program which was . . . established or maintained by an employer
14 . . . for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or
15 hospital care or benefits, or benefits in the event of sickness, accident, disability, death or
16 unemployment” 29 U.S.C. § 1002(1).

17 Defendants do not dispute that the short-term employment plan fits within the definition of
18 an employee benefit plan or an employee welfare benefit plan. Instead, Defendants maintain that
19 the plan is a “payroll practice” exempted from ERISA. In pertinent part, regulations governing
20 ERISA state, “[T]he terms ‘employee welfare benefit plan’ and ‘welfare plan’ shall not include . . .
21 [p]ayment of an employee’s normal compensation, out of the employer’s general assets, on account
22 of periods of time which the employee is physically or mentally unable to perform his or her duties,
23 or is otherwise absent for medical reasons” 29 C.F.R. § 2510.3-1(b)(2).

24 The short-term benefit plan fits within the outlined ERISA exemption. The plan calls for
25 “salary continuation payments” where an absence is due to a covered illness or injury. (Defs.’ Mot.
26

1 Summ. J. (#115), Ex. I.) Thus, the plan pays employee's "normal compensation" when the
2 employee is "physically or mentally unable" to perform his or her duties. Further, the general
3 assets of the company fund the plans. (*Id.*, Ex. HH at 24:16-19.) Accordingly, the court finds that
4 the short term disability plan is exempted from ERISA's provisions.

5 Notably, Plaintiff does not appear to dispute that the short term disability plan is a payroll
6 practice exempt from ERISA. Instead, Plaintiff contends that Defendants should be estopped from
7 arguing that the plan is exempt from ERISA. Plaintiff argues, "Throughout this litigation,
8 Defendants have consistently taken the position that the [plan] benefits were part of an ERISA plan
9 and not a 'payroll plan.'" (Pl.'s Opp. Mot. Summ. J. (#128) at 56).

10 It is not clear that Defendants have asserted inconsistent positions during this litigation. In
11 particular, the court notes that neither Defendants' previous motion to dismiss nor the court's order
12 granting in part and denying in part the motion to dismiss directly address the issue of whether the
13 short term disability plan itself was covered by ERISA. Regardless, the appropriate remedy for
14 Plaintiff's complaint here is not to prohibit Defendants from asserting that the plan is exempt from
15 ERISA, but instead to permit Plaintiff to amend his complaint to allege a wrongful termination
16 claim under state law based upon the exercise of his rights under the short term disability plan.¹⁰

17 Having concluded that the short term disability benefit plan is not governed by ERISA, the
18 court will grant summary judgment on all claims alleging ERISA violations based on the short term
19 disability benefit plan. In addition, the court will grant Plaintiff leave to amend the complaint as
20 described above.

21 ///

22 ///

23
24 ¹⁰ The court cautions that its ruling is in no way indicative of whether Plaintiff can in fact state a viable
25 wrongful termination claim or whether Plaintiff has evidence to support such a claim. Instead, the court merely
26 seeks to provide Plaintiff with an opportunity to assert the claim.

1 **2. Denial of Remaining Benefits**

2 In the complaint, Plaintiff alleges, “[his] rights and employee benefits are due and owing,
3 including, but not limited to short term disability, health benefits, and severance pay.” (Fourth
4 Am. Compl (#109) ¶ 75.) In particular, Plaintiff identifies the Welfare and Fringe Benefit Plan, the
5 Retirement Plan, and the Special Severance Benefits Plan as plans under which he is entitled to
6 benefits. Plaintiff asserts Defendants R.J. Reynolds and Reynolds American’s Employee Benefit
7 Committee’s decision to terminate Plaintiff’s benefits was “arbitrary, capricious, unreasonable,
8 discriminatory and not made in good faith in violation of . . . 29 U.S.C. § 1132.” (*Id.* ¶ 80.) In
9 relevant part, § 1132 provides that a participant or beneficiary may bring a civil action to recover
10 benefits due to him under the terms of his plan or to enforce his or her rights under the terms of a
11 plan. 29 U.S.C. § 1132.

12 In the motion for summary judgment, Defendants challenge Plaintiff’s claims regarding the
13 denial of benefits solely on the grounds that Plaintiff has failed to exhaust his administrative
14 remedies. Generally, “a claimant must avail himself or herself of a plan’s own internal review
15 procedures before bringing suit in federal court.” *Diaz v. United Agric. Employee Welfare Benefit*
16 *Plan and Trust*, 50 F.3d 1478, 1483 (9th Cir. 1995) (citation omitted). Exhaustion is not a
17 jurisdictional hurdle, but is instead a matter of policy whose application is within the court’s
18 discretion. *See Amato v. Bernard*, 618 F.2d 559, 568 (9th Cir. 1980) (“[F]ederal courts have the
19 authority to enforce the exhaustion requirements in suits under ERISA, and . . . as a matter of
20 sound policy they should usually do so.”). Although courts generally enforce the exhaustion
21 requirement, where resorting to administrative procedures is futile or where the available remedy is
22 inadequate, requiring exhaustion is not appropriate. *Id.* (citation omitted).

23 Here, Defendants argue that Plaintiff failed to exhaust his administrative remedies because
24 he never applied for and was never denied benefits under the Welfare and Fringe Benefit Plan, the
25 Retirement Plan, and the Special Severance Benefits Plan. Plaintiff does not dispute that he never
26

1 formally applied for such benefits. Instead, Plaintiff contends that Defendants should be estopped
2 from asserting an exhaustion argument. He argues, “As Defendants denied [Plaintiff’s] claims
3 without ever receiving a formal application from Plaintiff for the severance benefits, there was no
4 reason for him to submit a formal claim for his benefits under the Welfare and Fringe Benefit Plan,
5 the Retirement Plan, or the Special Severance Benefits Plan.” (Pl.’s Opp. Mot. Summ. J. (#128) at
6 58.)

7 On March 5, 2005, R.J. Reynolds sent two letters to Plaintiff notifying him that as a result
8 of his alleged misrepresentations, he was no longer eligible to receive short term disability benefits,
9 and he was no longer eligible for the Brown & Williamson Special Severance Benefits. On March
10 15, 2005, Plaintiff responded, sending letters to various R.J. Reynolds employees “request[ing] an
11 appeal of the decision that [he has] been terminated from [short term disability] benefits.” (Pl.’s
12 Opp. Mot. Summ. J. (#128), Exs. 115, 116, 117.)

13 Plaintiff has not cited any evidence indicating that he appealed R.J. Reynold’s decision to
14 revoke his eligibility for Special Severance Benefits. Instead, the evidence indicates that he only
15 sought an appeal of the termination of his non-ERISA short term disability benefits. Moreover,
16 none of the correspondence in any way addresses Plaintiff’s eligibility for the Welfare and Fringe
17 Benefit Plan or the Retirement Plan. Thus, it appears that Plaintiff never pursued his right to
18 receive benefits under the Special Severance Benefits Plan, the Welfare and Fringe Benefit Plan, or
19 the Retirement Plan.

20 The court further finds that Plaintiff has failed to demonstrate that exhaustion here would
21 be futile. As noted, R.J. Reynolds informed Plaintiff that he would not be able to appeal their
22 decision to terminate Plaintiff’s short term benefits. The short term disability benefit plan, as an
23 ERISA-exempt payroll plan, did not afford Plaintiff an unrestricted right to appeal. However, the
24 Special Severance Benefits Plan, Welfare and Fringe Benefit Plan, and the Retirement Plan are
25 ERISA plans and do provide Plaintiff a right to appeal. Plaintiff has failed to identify any evidence
26

1 indicating that R.J. Reynolds failed to accept an appeal or otherwise consider Plaintiff's eligibility
 2 for these benefits. In addition, throughout this litigation, Defendants have not demonstrated a clear
 3 refusal to consider Plaintiff's eligibility for or grant benefits under these ERISA plans. Instead,
 4 Defendants have focused on challenging Plaintiff's ineligibility for benefits under the short term
 5 disability plan.

6 Absent a showing of futility or that the remedy available pursuant to an appeal through the
 7 plans directly is inadequate, the court will require Plaintiff to exhaust his administrative remedies
 8 with regard to the Special Severance Benefits Plan, Welfare and Fringe Benefit Plan, and the
 9 Retirement Plan. Accordingly, the court will grant summary judgment as to these claims.¹¹

10 **3. Failure to Provide Information**

11 Plaintiff also alleges that Defendants Reynolds American and XYZ Administrators failed to
 12 provide information in violation of 29 U.S.C. § 1132(c). Section 1024(b)(4) of Title 29, United
 13 States Code, provides as follows:

14 The administrator shall, upon written request of any participant or beneficiary, furnish
 15 a copy of the latest updated summary plan description, plan description, and the latest
 16 annual report, any terminal report, the bargaining agreement, trust agreement, contract,
 17 or other instruments under which the plan is established or operated. The administrator
 may make a reasonable charge to cover the cost of furnishing such complete copies.
 The Secretary [of Labor] may by regulation prescribe the maximum amount which will
 constitute a reasonable charge under the preceding sentence.

18 29 U.S.C. § 1024(b)(4). Section 1132(c) provides, "Any administrator . . . who fails or refuses to
 19 comply with a request for any information which such administrator is required . . . to furnish to a
 20 participant or beneficiary . . . may in the court's discretion be personally liable to such participant
 21 of beneficiary in the amount of up to \$100 a day." 29 U.S.C. § 1132(c).

22 Relief under § 1132(c) is punitive, rather than compensatory in nature. *Glavor v. Shearson*

24 ¹¹ The exhaustion requirement applies only to Plaintiff's denial of benefit claim. The requirement does
 25 not apply to Plaintiff's remaining claims because these claims allege violations of the statute, ERISA, rather
 26 than violations of the specific plans at issue. *See Horan v. Kaiser Steel Retirement Plan*, 947 F.2d 1412, 1416
 n.1 (9th Cir. 1991) (citation omitted).

1 *Lehman Hutton, Inc.*, 879 F. Supp. 1028, 1034 (N.D. Cal. 1994). “[T]he penalties provisions of §
2 1132(c) were intended to induce compliance by plan administrators.” *Id.* (quoting *Paris v. F.*
3 *Korbel & Brothers, Inc.*, 751 F. Supp. 834, 839 (N.D. Cal. 1990)). Thus, “Under § 1132(c) only
4 the ‘plan administrator’ can be held liable for failing to comply with the reporting and disclosure
5 requirements.” *Vaught v. Scottsdale Healthcare Corp. Health Plan*, 546 F.3d 620, 633 (9th Cir.
6 2008) (quoting *Cline v. Indus. Maint. Eng’g & Contracting Co.*, 200 F.3d 1223, 1234 (9th Cir.
7 2000)).

8 On March 16, 2005, following his termination, Plaintiff sent a letter to R.J. Reynolds
9 employees Judy Greenwell, Senior Benefits Administrator, Shannon Tremblay, Senior
10 Management of Sales Employment Practices, and Ella Long, Senior Management of Employment
11 Practices, requesting “all copies of records, documentation that supported the decision to terminate
12 me. Specifically copies of records, documentation, that support the statement that I have
13 misrepresented to the Company my medical condition and physical limitations” (Pl.’s Opp.
14 Mot. Summ. J. (#128), Exs. 115, 116, 117.) In response to this request, Ella Long explained to
15 Plaintiff the reasons for his termination, but did not provide Plaintiff with any documents.

16 On January 12, 2006, Plaintiff sent a written request to Ms. Long, seeking the name and a
17 copy of “R.J. Reynolds/Reynolds American Employee Benefits Plan.” (Pl.’s Opp. Mot. Summ. J.
18 (#128), Ex. 132.) On January 17, 2006, Jennie Beasley, Director of Corporate and Benefit
19 Compliance, responded, informing Plaintiff she needed to know to “which kind of benefit plan
20 (pension, medical, 401(k), disability, etc.)” Plaintiff was referring. (*Id.*) On January 27, 2006,
21 through his attorney, Plaintiff again sent a letter seeking the requested information. On February
22 22, 2006, Ms. Beasley responded, identifying the employee benefit plans in which Plaintiff was
23 eligible to participate prior to his termination. Ms. Beasley included in her response copies of each
24 plan. In the letter, Ms. Beasley also informed Plaintiff that the plan administrator for each
25 employee benefit plan is Defendant Reynolds American Benefits Committee. There is no evidence
26

1 indicating that Plaintiff requested information from this Defendant.

2 To be liable under § 1132(c), a defendant must receive a request for information. *Sgro v.*
3 *Danone Waters of N. Am. Inc.*, 532 F.3d 940, 945 (9th Cir. 2008). Here, Plaintiff has properly
4 named the plan administrator, Defendant Reynolds American Benefits Committee, as Defendant to
5 his § 1132(c) claim. However, Plaintiff has failed to provide any evidence indicating that he
6 requested or was denied information from the plan administrator. Accordingly, summary judgment
7 as to this claim is appropriate.

8 **4. Equitable Estoppel**

9 In January of 1995, Defendant Brown & Williamson offered Plaintiff an employment
10 position. It appears undisputed that when Brown & Williamson offered Plaintiff the position, they
11 agreed that Plaintiff's previous fifteen years of employment with American Tobacco would count
12 towards his years of employment with Brown & Williamson. Plaintiff alleges that in November or
13 December of 2003, after announcing the merger with R.J. Reynolds, Brown & Williamson
14 informed Plaintiff that he was not eligible for the "Rule of 60 " retirement plan because he was not
15 an employee of record in 1994.

16 The Rule of 60 retirement plan provides retirement benefits for a "covered participant (1)
17 who has completed at least 10 years of qualifying service and (2) whose age in full years on his
18 date of actual termination of employment plus his years of qualifying service on such date equal at
19 least sixty." (Defs.' Mot. Summ. J. (#115), Ex. JJ at RJ 1164.) To qualify for the Rule of 60, the
20 employee must have been a participant in the Brown & Williamson Retirement Plan prior to July
21 1, 1994.

22 Defendants maintain that even if Brown & Williamson agreed that Plaintiff's hire date
23 would retroactively be October of 1980, Plaintiff is nonetheless not eligible for Rule of 60 benefits
24 because he was not a participant in the Retirement Plan prior to July 1, 1994. Brown &
25 Williamson did not acquire American Tobacco until 1995. More importantly, American Tobacco's
26

1 retirement plan was maintained separately until December 31, 1998, when the Brown &
2 Williamson and American Tobacco retirement plans were merged. Thus, it appears that the only
3 evidence upon which Plaintiff relies is that in 1995 a district manager of Brown & Williamson
4 allegedly told Plaintiff that his years of services with American Tobacco would be counted towards
5 all benefits with Brown & Williamson.¹²

6 “An ERISA beneficiary may recover benefits under an equitable estoppel theory upon
7 establishing a material misrepresentation, reasonable and detrimental reliance upon the
8 representation and extraordinary circumstances.” *Pisciotta v. Teledyne Indus.*, 91 F.3d 1326, 1331
9 (9th Cir. 1996) (citation omitted). In addition, to establish a claim of equitable estoppel, the Ninth
10 Circuit requires (1) the provision of the plan at issue to be ambiguous such that reasonable persons
11 could disagree as to their meaning and effect and (2) the representations must involve an oral
12 interpretation of the plan. *Id.* (citing *Greany v. Western Farm Bureau Life Ins. Co.*, 973 F.2d 812,
13 821-22 (9th Cir. 1992).

14 Plaintiff has failed to demonstrate genuine issues of material fact concerning his equitable
15 estoppel claim. Even assuming that the district manager specifically informed Plaintiff that his
16 years of service would be counted toward his qualification for benefits under the Retirement Plan,
17 Plaintiff has failed to identify the necessary extraordinary circumstances to support a claim of
18 equitable estoppel. He has shown at most a single instance of Brown & Williamson
19 misrepresenting its coverage, rather than a series of continuing false assurances. Moreover,
20 Plaintiff has failed to allege or cite to evidence indicating that he relied on the alleged
21 misrepresentation in choosing to undertake employment with Brown & Williamson. *Cf. Spink v.*
22 *Lockheed Corp.*, 125 F.3d 1257, 1262-63 (9th Cir. 1997) (finding estoppel where (1) employer
23

24 ¹² Defendants argue that this statement is inadmissible hearsay. Plaintiff counters that the statement
25 is a party admission exempt from the hearsay rules pursuant to Federal Rule of Evidence 801(d)(2). However,
26 the court need not decide the issue. Even assuming the statement is admissible, as discussed below, Plaintiff
has failed to demonstrate a genuine issue of material fact concerning the equitable estoppel claim.

lured employee away from a competitor in part through inaccurate promises regarding employee's eligibility for retirement plan, and (2) for three years employer issued statements reflecting benefit accrual despite employee's ineligibility). Accordingly, summary judgment with regard to the equitable estoppel claim is appropriate.

5. Wrongful Discharge

Plaintiff alleges Defendants "terminated Plaintiff for exercising his rights under his employee benefit plans and for the purpose of interfering with his attainment of any rights under [the] plans" in violation of 29 U.S.C. § 1140.¹³ (Fourth Am. Compl. (#109) ¶ 87.) Under § 1140, it is "unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provision of an employee benefit plan . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan" 29 U.S.C. § 1140. Thus, § 1140 provides two separate types of protection. First, the section protects against discharge designed to block the vesting of rights under benefit plans. Second, the section protects an employee from facing retaliation for exercising his rights under a benefit plan. Here, the complaint alleges both wrongful interference and retaliation claims.

As a preliminary matter, the court finds that Plaintiff's retaliation claim must fail. Plaintiff argues Defendants terminated him for exercising his rights under the short term disability plan. Section 1140 prohibits an employer from retaliating against an employee for exercising any right to which he is entitled under the provisions of an "employee benefit plan, this title, [29 U.S.C. § 1201], or the Welfare and Pension Plans Disclosure Act." 29 U.S.C. § 1140. As discussed above,

¹³ Although Plaintiff identifies "Defendants" generally in the claim, § 1140 applies by its terms only against "persons," defined by ERISA to exclude benefit plans and benefit committees. *See* 29 U.S.C. § 1002(9) ("The term 'person' means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, or employee organization."). Thus, R.J. Reynolds, as a corporation and as the successor in interest to Brown & Williamson is the only Defendant against whom Plaintiff may assert the claim.

1 the short term disability plan is not an “employee benefit plan” within the meaning of ERISA, and
2 Plaintiff does not allege that the short term disability plan otherwise falls within one of the
3 remaining identified categories. Thus, Plaintiff’s retaliation claim fails.

4 To establish wrongful interference, the plaintiff must demonstrate that his employment was
5 terminated because of a specific intent to interfere with ERISA rights. *Dytrt v. Mountain State Tel.*
6 *& Tel. Co.*, 921 F.2d 889, 896 (9th Cir. 1990) (citations omitted). Accordingly, “no action lies
7 where the alleged loss of rights is a mere consequence, as opposed to a motivating factor behind
8 the termination.” *Id.*

9 Plaintiff argues Defendants’ specific intent can be inferred from Defendants’ conduct and
10 the questionable basis upon which Defendants based their decision to terminate Plaintiff. As
11 discussed above, from the time Plaintiff began short term disability leave in June of 2004 to his
12 termination in March of 2005, Defendants required Plaintiff to undergo physical examinations and
13 assessments on three separate occasions by three different physicians. Each physician concluded
14 that Plaintiff’s physical state prevented him from performing the functions of his job. Defendants
15 admit that they were dissatisfied with the procedures followed during and the results of each of
16 these physical examinations.

17 Dissatisfied with the examination results, Defendants turned to surveillance tactics. After
18 observing Plaintiff driving and exercising at the gym, Defendants terminated Plaintiff. However,
19 at least one of the physicians hired by R.J. Reynolds noted that Plaintiff regularly exercised, and
20 numerous other physicians specifically prescribed regular exercise as a part of Plaintiff’s treatment.
21 In addition, the doctors emphasized that Plaintiff could not perform the driving required by his job
22 (driving approximately 800 miles a week), and not that Plaintiff was incapable of driving at all.
23 While there is conflicting evidence regarding the extent of Plaintiff’s exercise and driving, these
24 are issues of fact inappropriate for resolution on a motion for summary judgment.

25 Thus, viewed in the light most favorable to Plaintiff, the court finds that Defendants’
26

1 repeated insistence that Plaintiff undergo physical examinations, the consistency of the results of
2 the examinations, Defendants' refusal to accept the results of the examinations, Defendants'
3 surveillance tactics, and Defendants failure to provide Plaintiff with any benefits, raise genuine
4 issues of material fact regarding whether Defendants terminated Plaintiff for the purpose of
5 denying him benefits to which he might otherwise be entitled. Accordingly, the court will deny
6 summary judgment with regard to the wrongful interference claim.

7 **F. Defamation**

8 Plaintiff's seventh claim for relief alleges Defendants made statements regarding the
9 reasons for Plaintiff's termination that were defamatory. Plaintiff contends that Defendants have
10 "negligently and intentionally published said defamatory statements to Plaintiff's former co-
11 employees, Plaintiff's customers and clientele, vendors and other third parties" (Fourth Am.
12 Compl. (#109) ¶ 94.) Further, Plaintiff alleges that these statements qualify as "defamation per
13 se," as the statements related to Plaintiff's fitness to conduct his business.

14 Generally, a defamation claim requires the Plaintiff to show the following: (1) a false and
15 defamatory statement of fact by the defendant concerning the plaintiff; (2) an unprivileged
16 publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed
17 damages. *Pope v. Motel 6*, 114 P.3d 277, 282 (2005). However, the court considers certain types
18 of defamatory statements to be defamatory per se. These types of statements are actionable
19 without proof of damages. Nevada has recognized statements tending to injure the plaintiff in his
20 or her business or profession as defamatory per se. *Chowdry v. NLVH, Inc.*, 851 P.2d 459, 484-84
21 (Nev. 1993).

22 In response to the motion for summary judgment, Plaintiff has identified two instances
23 where Defendants allegedly published defamatory statements.¹⁴ First, Plaintiff identifies the letter
24

25 ¹⁴ Defendants assert that Plaintiff identifies a third publication to the Nevada Department of
26 Employment during unemployment and worker's compensation proceedings. However, to the extent that
Plaintiff asserted such a claim at one time, he appears to have abandoned it. As Defendants note, such

1 R.J. Reynolds sent informing him of his termination. This statement cannot support Plaintiff's
2 defamation claim as it was not published to a third party.

3 Second, Plaintiff notes that on March 19, 2005, R.J. Reynolds employee Dr. Collins
4 contacted the claims adjuster for Travelers Insurance, the insurance carrier for Plaintiff's 2003
5 worker's compensation claim. During the conversation, Dr. Collins informed the claims adjuster
6 that through surveillance, Defendants "got some great video" on Plaintiff. (Pl.'s Opp. Mot.
7 Summ. J. (#128), Ex. 122.) Dr. Collins then described the contents of the video. Dr. Collins later
8 mailed the videos and the written report by the surveillance team to the insurance adjuster.

9 Defendants argue that statements made by Dr. Collins to the insurance adjuster constitute
10 an evaluative opinion. The First Amendment protects statements of opinion, and such opinions are
11 not actionable. *Lubin v. Kunin*, 17 P.3D 422, 425 (Nev. 2001) (citation omitted). To determine
12 whether a statement constitutes a fact or opinion, the court asks "whether a reasonable person
13 would be likely to understand the remark as an expression of the source's opinion or as a statement
14 of existing fact." *Id.* "So long as it is based on true and public information, an evaluative opinion
15 conveys the publisher's judgment as to the quality of another's behavior and, as such, it is not a
16 statement of fact." *Id.* (citing *People for the Ethical Treatment of Animals v. Bobby Beresini, Ltd.*,
17 895 P.2d 1269, 1275 (Nev. 1995), *overruled on other grounds*, 940 P.2d 134 (Nev. 1997)). In
18 certain instances, a statement may be a mixed statement of fact and opinion. Such a mixed
19 statement is actionable where it is "an opinion, which gives rise to the inference that the source has
20 based the opinion on underlying, undisclosed defamatory facts." *Id.* (citation omitted). Where a
21 statement is ambiguous, the question of whether it is a fact or an evaluative opinion is left to the
22 jury. *Id.*

23 Here, the evidence presented indicates that Dr. Collin's statements to the claims adjuster
24

25 communications are absolutely privileged. See *Circus Circus Hotels v. Witherspoon*, 657 P.2d 101, 105-06
26 (Nev. 1983); NRS § 612.265(7).

1 were limited to statements of fact relaying the contents of the video rather than an expression of
2 Dr. Collin's opinion. Indeed, the evidence indicates that Dr. Collins merely described what the
3 video portrayed, without inserting his own opinion. The accuracy and genuineness of the contents
4 of the video is not in dispute. Thus, the truthful statements relating to the admittedly accurate
5 contents of the video cannot form the basis of Plaintiff's defamation claim. *See Ornatek v. Nevada*
6 *State Bank*, 558 P.2d 1145, 1147 (Nev. 1977) (noting that truth is a defense to defamation).

7 Plaintiff also argues the court can infer that during the conversation Dr. Collins also
8 advised the adjuster that Plaintiff had misrepresented his medical condition and physical limitation.
9 Even if Plaintiff made such a statement, Defendants argue that the statement would be an
10 evaluative opinion entitled to First Amendment protection. In *Berosini*, the court found a
11 statement by a PETA member based on his interpretation of a videotape that Berosini had abused
12 animals in the videotape was nonactionable in defamation. 895 P.2d at 1275. The court reasoned
13 that "all facts upon which [the] opinions were based were 'disclosed' in the videotape itself." *Id.*

14 Similarly, here the evidence indicates that any statements Dr. Collins made to the adjuster
15 were based on the videotape. Such statements would reflect Dr. Collin's judgment as to the quality
16 of Plaintiff's behavior as observed on the videotape. The insurance adjuster was able to view the
17 videotape and make her own, independent assessment of Plaintiff's behavior. Thus, the court finds
18 that any such statement would be an evaluative opinion and could not provide the basis for a
19 defamation action.

20 Plaintiff has failed to identify any other instances of publication. Accordingly, the court
21 will grant the motion for summary judgment with regard to the defamation claim.

22 **G. Breach of Contract**

23 Finally, Plaintiff alleges that Defendants Brown & Williamson and/or R.J. Reynolds
24 agreed, through a binding contract, that Plaintiff was entitled to salaried continuation payments
25 pursuant to the short term disability plan. Plaintiff maintains that Defendants breached the short
26

1 term disability plan by terminating the short term disability payments.

2 Plaintiff contends that the short term disability benefits were a part of his compensation
3 package. Plaintiff argues, “[The short term disability benefits] were part of Plaintiff’s express
4 employment agreement with Defendants whereby Plaintiff agreed to provide certain labor services
5 in exchange for monetary compensation in the form of salary and benefits.” (Pl.’s Opp. Mot.
6 Summ. J. (#128) at 70.) The court has rejected this argument in the above discussion.
7 Accordingly, the court will grant summary judgment with regard to Plaintiff breach of contract and
8 breach of implied covenant of good faith and fair dealing claims.

9 **H. Motion to Strike**

10 After filing their Reply (#135), Defendants also filed an “Errata to Reply in Support of
11 Summary Judgment” (#137) and an “Amended Statement of Undisputed Facts” (#139). In
12 response, Plaintiff has filed a motion to strike both documents (#140). The court has not reviewed
13 or relied upon either of the submitted documents in considering the motion for summary judgment.
14 Accordingly, the court will grant the motion to strike.

15 IT IS THEREFORE ORDERED that Defendants’ Motion for Summary Judgment (#115) is
16 hereby GRANTED in part and DENIED in part.

17 IT IS FURTHER ORDERED that Plaintiff’s Motions to Strike (#140) is hereby
18 GRANTED.

19 IT IS FURTHER ORDERED that Plaintiff shall have ten (10) days from the issuance of
20 this order to amend his complaint as discussed herein.

21 IT IS SO ORDERED.

22 DATED this 10th day of March, 2009.



23
24
25 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE